Supreme Court of the United States

OCTOBER TERM, 1941.

No. ..... .

SONKEN-GALAMBA CORPORATION, A CORPORATION, AND THE TANK CORPORATION, A CORPORATION, PETITIONERS,

VS.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, A CORPORATION; AND THE TEXAS AND PACIFIC RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court was rendered July 3, 1940, and is reported as *Sonken-Galamba Corporation et al. v. A., T. & S. F. Ry. Co. et al.*, 33 F. Supp. 814,

pages 193 to 204, of the printed record. The opinion of the Eighth Circuit Court of Appeals was rendered January 8, 1942. It is not yet reported and is shown in full at page 3873 of the printed record.

II.

JURISDICTION.

A complete statement of the basis of the jurisdiction of this court has been given under heading B in the Petition, *supra*. In the interest of brevity it is not repeated here.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the Petition, *supra*. In the interest of brevity it is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that each shipment of the commodity involved was to be tested by whether it had a value for other than remelting purposes at the time and place where tendered without regard to the national demand, and in refusing to hold that the value in question was value of the commodity as a class, that is, the definite, uniform and general value rather than local, partial and personal values.

2. In holding that the mandamus judgments in favor of one of petitioners against each of respondents and against Western Weighing and Inspection Bureau, of which respondents were members, was not conclusive, as to all shipments of material falling in the same class, and

assertable by all shippers, whether parties to prior proceedings or not.

3. In holding that damages were not recoverable because the petitioners' claim was bottomed on injury to a business including commodity not involved in the mandamus cases and in holding respondents justified in declining to transport such other material as scrap, and in holding there was no loss of market and no compensable loss of financial backing.

V.

SUMMARY OF ARGUMENT.

POINT A.

Usage Determining a Commodity's Commercial Identity Must Be Uniform and General.

1. In classifying an article under a general enactment its commercial designation is determined by its established usage. Such usage and value must be definite, uniform and general and not merely partial, local or personal. The commodity must be identified as a class and not by parts of the class.

Maddock v. *Magone*, 152 U. S. 368.
Berbecker v. *Robertson*, 152 U. S. 373.

(1) Determining identity by value of each individual shipment of a commodity at time and place of tender is discriminatory and illegal, since identical shipments might be accorded different rates according to the use each was put to.

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.
I. C. C. v. *B. & O. R. Co.*, 225 U. S. 326.
I. C. C. v. *D., L. & W. R. Co.*, 220 U. S. 235.
Union Smelt. & Ref. Co. v. *Penn. R. Co.*, 152 I. C. C. 434.

(2) Tariff definition of scrap—"having value for remelting purposes only" defines the nature of the commodity as a whole and as a class and must not be applied so as to make the rate dependent on the use.

Pittsburgh Crushed Steel Co. v. *B. & M. R. Co.*, 140 I. C. C. 339.

Alaska Junk Co. v. *S. P. & S. R. Co.*, 98 I. C. C. 551.

Graver Corp. v. *So. Ry. Co.*, 156 I. C. C. 619.

(3) Each shipment should be considered and evaluated as a mere incident of a vast stream of commerce, the classification to be identified by the whole and not by its isolated parts.

(4) The proof showed this commodity as a class had national scale value for remelting purposes, and was traded in for non-melting uses in only one part of this country. Uses to which exported material was put have no bearing.

Tyng v. *Grinnell*, 92 U. S. 467.

R. Boker & Co. (Inc.) v. *U. S.*, 19 Ct. Cust. & Pat. App. 27.

(5) Commodity not "plates" because deteriorated and not of even gauge and thickness.

Prosser v. *U. S.*, 1 Ct. Cust. & Pat. App. 29.

Davis George Mfg. Co. v. *A. G. S. R. R. Co.*, 123 I. C. C. 10.

(6) Commodity was deteriorated to condition recognized by Commission as scrap stage, viz., undamageable in open car shipment.

Waste Mat. Dealers Ass'n v. *C., R. I. & P. Ry. Co.*, 164 I. C. C. 587.

Reduced Rates, 68 I. C. C. 676.

Consol. Southwestern Cases, 123 I. C. C. 203.

(7) Interstate Commerce Commission has ruled that under "strict sense" construction of tariff definition there is no steel material that has value for remelting purposes

only. Hence, common sense, practical interpretation is necessary.

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.

Pittsburgh Crushed Steel Co. v. *B. & M. R. Co.*, 140 I. C. C. 339.

(8) Importance of settling the classification of this this commodity.

POINT B.

Character of the Commodity Was Adjudicated by the Mandamus Judgments and Could Not Be Relitigated.

1. Proper classification of this commodity as scrap was litigated by each of respondents against one of petitioners. In the interest of uniformity, such finding should be held to inure to all shippers and to apply to all shipments of commodity of the same class.

Phillips v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662.

Mitchell Coal Co. v. *Penn. R. Co.*, 230 U. S. 247.

Babbitt Bros. Tr. Co. v. *A., T. & S. F. Ry.*, 156 I. C. C. 677.

Nat. Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. 65 (C. C. A. 9).

A. L. Jones Co. v. *C., M. & St. Paul Ry. Co.*, 213 Ill. App. 283.

POINT C.

Damages Are Recoverable If the Commodity Is Scrap.

1. If it is ultimately determined that the commodity was scrap under the true test of value, then petitioners are entitled to damages resulting from respondents' wrongful refusal to transport same at scrap rates.

VI.

ARGUMENT.

POINT A.

(SPECIFICATION 1.)

Usage or Value to Determine the Commercial Identity of a Commodity Must Be Definite, Uniform and General and Not Merely Local, Partial or Personal.

(a)

The tariffs provide that rates on scrap apply to "pieces of * * * steel * * * having value for remelting purposes only." The controversy is as to the sense in which "value" is used. To avoid running afoul of statutory prohibitions against discrimination the definition must be construed so as to apply the rate uniformly to all physically identical shipments.

The court below, following its own previous opinion in *Crancer* v. *Lowden*, 121 F. 2d 645, now pending in this court on certiorari granted October 13, 1941, No. 505, declared the test was simply to consider each tendered shipment by itself and if IT had any value except for remelting IT was not scrap.

Petitioners contended unsuccessfully that such a method in the last analysis bases the rate of each particular shipment on the use for which it is sold, a criterion of rate-making repeatedly condemned by this court and by the Interstate Commerce Commission as illegal. So tested, one of two identical shipments might at the very same time and place be scrap and the other not, and in place of uniformity there would be discrimination and confusion.

Petitioners contended that the true test was that each shipment should be considered as a mere incident of a vast national scale stream of commerce in such commodity, and

the commercial designation and classification should be of the commodity as a class and identified by the whole, the parts taking on the color of the whole. And if upon a broad view of the whole it appeared that the commodity was consistently and generally regarded solely as elementary metal valuable only for remelting, then it was scrap, notwithstanding other localized uses of limited quantities or particular shipments in limited areas for other uses.

(b)

A concrete example illustrates the untenability of the sustained test. Suppose ten dealers each tender for shipment a carload of the identical commodity. Suppose one car was consigned to a purchaser for some of the miscellaneous uses adverted to in the opinion. Suppose the other nine cars were consigned to mills for remelting, no other sales thereof being possible. It cannot be that nine cars are scrap and the other is not. Suppose all ten happened to move out of the shipping point at the same time and as part of a single train. Certainly these identical cars must be deemed the same commodity. Or suppose five cars in the East move to the mills, salable only for remelting, and five cars in the Southwest move at the same time to a nearby consignee using same for non-remelting purposes. It cannot be that five cars are scrap and five are not. Or suppose today five cars are sold locally for non-remelting uses, and for the next month there is no market except the mills, then five cars are again sold for special uses. It cannot be that the commodity is not scrap today but is scrap the next month and then not scrap the next day.

The Interstate Commerce Commission has condemned such an application of the definition, saying:

> "Aside from this contention, however, complainant urges that it is the practice of defendants, in interpreting this definition and in determining

whether they will apply the scrap-iron rates on a particular shipment, to inquire into the character, business, and equipment of the consignee; so that if the consignee happens to be a steel mill equipped to remelt the material the scrap-iron rate is applied, but if the consignee has no remelting facilities and puts the material to some use which does not entail remelting the scrap-iron rate is not applied even though the material is identical in kind. The evidence introduced by complainant strongly supports its contention in this respect and is not controverted by defendants. Such a method of determining the rates to be applied is clearly indefensible. There can be but one applicable rate on like shipments of the same commodity between the same points."

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.

The Commission has repeatedly pointed out that neither use, price, demand, representations or incidents of billing determine whether a commodity is scrap, and the definition is not to be so construed.

"The words 'value for remelting purposes' define the nature of the article, and they do not make the rate to be applied dependent upon its use."

Alaska Junk Co. v. *Ry. Co.*, 98 I. C. C. 551.

Pittsburgh Crushed Steel Co. v. *R. Co.*, 140 I. C. C. 339.

Graver Corp. v. *Ry. Co.*, 156 I. C. C. 619.

It is illegal to determine rates according to the use to which a commodity is put.

I. C. C. v. *Rr. Co.*, 225 U. S. 326.

I. C. C. v. *Rr. Co.*, 220 U. S. 235.

Union Smelt. & Ref. Co. v. *Rr. Co.*, 152 I. C. C. 434.

"Nature" as used in the above quotation simply means "species."

(c)

This court has announced the principle controlling the ascertainment of the commercial identity of a commodity moving generally throughout the national flow of commerce.

> "Necessarily, the commercial designation is the result of *established usage* in commerce and trade; and such usage, to affect *a general enactment*, must be *definite, uniform*, and *general*, and *not partial, local* or *personal*.
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> * * * * * * *
>
> But the difficulty is that if these articles were only so known in one trade or branch of trade, or *in one part of the country*—partially and locally, and not uniformly and generally—the conclusion announced by the instruction would not follow. Recovery could not be had on a theory, involving different rates of duty at different ports of entry. * * *" (Italics ours).
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> *Maddock* v. *Magone*, 152 U. S. 368, 14 S. Ct. 588.
> *Berbecker* v. *Robertson*, 152 U. S. 373, 14 S. Ct. 590.

We do not see why the above test, laid down in cases arising under the customs tariffs governing imports, is not applicable here. To attain the uniformity aimed at by the Interstate Commerce Act, the value which earmarks a commodity must necessarily be the result of established usage in commerce so extensive and so consistent as to be definite, uniform and general. In this view, partial, local, temporary and personal uses must be laid out of consideration. Thus only may the definition of "scrap" be given a workable, valid operation.

(d)

Under the evidence, the commodity involved in the case at bar (rusted pieces of old, obsolete, abandoned, wrecked oil tanks) has been traded in extensively and for years all over the United States as scrap supplying the

mills. That is its sole use and value in the East so far as the evidence in this record is concerned. Respondents took over a hundred depositions in the United States and even in foreign countries, yet they carefully limited their inquiry so as not to reveal the value and use of this commodity East of the Mississippi. Thereupon, petitioners furnishing the only evidence as to the condition in the East, showed without contradiction that the only recognized commercial value of this commodity in the East was for remelting purposes. The aforementioned Eastern carriers and rating Bureaus regard the commodity as scrap. Before this controversy arose the Western carriers and rating Bureaus so regarded it. Indeed, even during the period in question large tonnages of the commodity were shipped and transported as scrap from the Southwest to the Eastern mills for remelting. Hence, it is undeniable that the one and only "definite, uniform and general" value of the commodity recognized everywhere in the country was for remelting.

Other uses to which the commodity was diverted in the Southwest may be dismissed for they were all confined to a limited part of the country and to but a handful of the 20,000 scrap dealers in this country. They were experimental, temporary, fortuitous and sporadic. They fall squarely within the language of this court in the Maddock case—"partial, local or personal." The uses of the exported commodity—to hand-forge small tools therefrom—are likewise of no consequence here, for the use made in a foreign country of a given commodity cannot be allowed to determine its identity in this country. *Tyng* v. *Grinnell,* 92 U. S. 467; *Boker & Co.* v. *U. S.,* 19 Ct. Cust. & Pat. App. 27.

Nor is there anything in respondents' contention that the commodity was "plates," as designated in the tariffs. The court of appeals did not pass on this or so hold. The distinguishing characteristic of the "plate" of commerce

is "uniformity of thickness and evenness of surface." *Prosser* v. *U. S.*, 1 Ct. Cust. & Pat. App. 29, 31. All of the material involved here consisted of fragments or pieces of tanks so rusted and deteriorated that no single piece was of uniform gauge or thickness, and all had reached what the Commission regards as the scrap stage from a transportation standpoint, viz., it loaded heavily in open cars and was not susceptible of further damage. *Waste Material Dealers Ass'n* v. *C., R. I. & P. Ry. Co.*, 164 I. C. C. 587; *Reduced Rates*, 68 I. C. C. 676; *Consolidated S. W. Cases*, 123 I. C. C. 203.

(It may not be amiss here to point out that the popular conception of scrap as a tangled mass of miscellaneous pieces of iron and steel is erroneous. The mills all have more or less uniform requirements set out in printed specifications. Scrap is classified into approximately seventy-five kinds, and plate scrap is one of the prime classes, for scrap must fit compactly in the charging boxes of the furnaces of the mills.)

(e)

Tariffs are for the guidance of business men and must be plain and unambiguous. A shipper is entitled to know the rate of his commodity without question before he ships. Tariffs on scrap are addressed to dealers in scrap. Scrap dealers throughout the country may be expected to know of the "definite, uniform and general" value and usage of their commodity. They are not expected to acquaint themselves with local, partial or personal uses. The recognized commercial value (for remelting), which identifies scrap as a class, is so general and so thoroughly established as to enable a scrap dealer to recognize scrap by its nature and by inspection, just as a farmer or a grain dealer can recognize wheat. Nothing less definite, general or established, in the way of usage or value, can be allowed to transform scrap into something else.

Of course, as the court below pointed out, the iden-

tification of each shipment of a commodity depends on examination of each shipment "for itself." This simply means that the character of wheat being known, recognizable and established upon broad, universally applicable considerations, the specific examination of the particular car is only to compare that car with the known class to determine if it is the same, of the same *nature,* and falls therein. Similarly the character of scrap is identified by a definition broadly identifying it as a class, but once the class is identified the note has served its true function. Thereafter, the particular inspection is only to compare the specific shipment with the known class as a whole, to ascertain if it is the same. And since the Commission has spoken and has reiterated in the note what comprises the class of scrap, such specific inspections, examinations, inquiries and comparisons are cognizable by any court or fact-finding body. To hold otherwise would amount to saying that the Commission has in words saved the validity of the note, when it says that it simply defines the *nature* (species) of the commodity and does not make the rate of a particular shipment dependent on the use it is put to, but having thus sustained the definition, it may be applied in its objectionable sense.

As a matter of fact a small percentage of all scrap is everywhere diverted to other uses. The evidence shows that the annual scrap traffic is upwards of 35,000,000 tons and approximately 3% or 500,000 to 1,000,000 tons annually are used for non-remelting purposes (R. 870). Under respondents' theory there literally is no such thing as scrap in this country.

The Commission, recognizing that under a literal application of the definition there is no such thing as scrap, has repudiated a "strict sense" construction of the tariff definition.

> "However appropriate it may have been originally, when much of the material now com-

mercially used for further manufacture without being remelted was perhaps regarded purely as waste and suitable only for remelting, it now appears that *there is little, if any, material which in a strict sense* can be said to be of such a character as to have value for remelting purposes only.

* * * * * * *

The situation disclosed clearly indicates the necessity of a revision of the present tariff provision with respect to scrap iron.

* * * * * * *

We have previously adverted to the unlawful manner in which apparently this definition is being applied by defendants and the necessity for a revision thereof in order to *more accurately describe the traffic intended to be covered.* The fact that such a revision may be attended with difficulty is no justification for denying to complainant reasonable rates" (Italics ours).

Wrought Washer Mfg. Co. v. *Pere Marquette Ry. Co.*, 136 I. C. C. 703.

Indeed, if the definition is such as to render nugatory the classification of scrap, for that nothing could qualify under it as a practical proposition, then the definition is void and must be disregarded. Otherwise it would be a trap and a snare for the unwary shipper.

It follows that the definition must be given the broad, common sense interpretation which petitioners contend for. In fact, ever since the Wrought Washer Mfg. Co. case the Commission itself has so applied the definition. To illustrate, in *Pittsburgh Crushed Steel Co.* v. *Rd. Co.*, 140 I. C. C. 399, where the shipper shipped carload after carload of steel screenings to a purchaser using same as an abrasive, it was held that this did not change the fact that the commodity was in its very nature scrap. For that matter, in the *Wrought Washer Mfg. Co. case*, 136 I. C. C. 703, the Commission reached the same result as to old boiler plates sold to a

washer manufacturing company and used by it to make washers from, holding it illegal to deny thereto the same rate as the billet or scrap rate.

(f)

There is a vast tonnage of this old tank steel that can be shipped to the mills if it is scrap. The identity of the commodity ought not to be allowed to remain in doubt, for scrap steel is of utmost importance in the nation's war preparations. If the test sanctioned by the court below stands, the numerous abandoned tanks must lie in the fields, for no shipper can afford to purchase, wreck and ship them except as scrap at scrap rates.

POINT B.

(SPECIFICATION 2.)

Character of the Commodity Was Adjudicated by the Mandamus Judgments and Could Not Be Relitigated.

Four times a commodity of the class in question was adjudicated to be scrap, twice by juries and twice by courts, with affirmance by two Circuit Courts of Appeals. One Circuit Court of Appeals thereafter denied leave to reopen the proceeding. Certiorari was denied by this court to the other Circuit Court of Appeals. But railroads are able to litigate forever, while, as this court has frequently pointed out, a single shipper cannot afford to stand up against them.

When it came to paying for their violations of the Act the carriers were permitted to relitigate the whole question a fifth time. This time they won.

That seems wrong to us. It offends the spirit of every rule against unfair protraction of litigation. Each respondent tried out the question in a case in which it was a party, and has had its day in court. All are members of the Western Weighing and Inspection Bureau bound by a judgment classifying the particular material

and all similar material. Why should they be allowed to relitigate the same question over and over again? If the courts erred there is a remedy, for the Commission has the power to reclassify.

In such circumstances the only possible question remaining was whether or not the material involved in the mandamus suits and that involved in the damage suit was substantially the same. However, there was no serious contention at the trial that there was any substantial difference. Respondents took the position that the material was *all* plates. Petitioners contended it was *all* scrap. The Western Weighing and Inspection Bureau in its initial circular letter of February 2, 1937, took the position that all of these shipments of "steel plates taken from dismantled oil tanks" were a "class of material" that was not scrap (R. 321 to 325).

Petitioners in every manner and in every court manifested that they considered the tonnage of material involved in the mandamus cases to stand on the same footing as the other tonnage involved in the suit for damages. Whatever distinctions they attempted as to the one they asserted as to the other. All uses made of material not involved in the mandamus suits were made of material involved in same. Indeed, respondents relied on their very evidence adduced in depositions taken in this case to support their contention that even the precise material adjudicated in the mandamus cases was not scrap, for when they applied to the Eighth Circuit Court of Appeals to reopen the mandamus case they supported their petition with a summary of the evidence in the instant case. Moreover, in the damage suit they re-introduced the records containing all of the evidence that had been adduced in the mandamus cases, as well as additional evidence as to the precise material involved in the mandamus cases.

In any event the trial court took the view that the issues in the mandamus cases and in the damage suit were

identical, although anomalously holding that the issues were not to be so regarded for the purpose of applying the doctrine of estoppel by judgment. The trial court said:

> "It should be easily conceivable that the weight of the evidence offered at a trial of such duration, involving such volume of testimony and exhibits, might well be on a different side of an identical issue than it was at trials requiring only a few days. *Exactly that has happened*" (Italics ours).
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> *Sonken-Galamba Corp.* v. *A., T. & S. F. Ry Co.*, 33 F. Supp. 814 (R. 195).

It is our view that under a federal statute regulating carriers and shippers and requiring uniformity of treatment, whenever a carrier has once litigated the classification of a particular commodity, the decision is forever binding against that carrier, whenever a question as to classification of material belonging to the same class arises. Otherwise a particular shipper who obtained judgment could ship at the ordered rate while other shippers of a similar commodity could be denied that rate simply because they were not formal parties to the action. The carrier ought not be allowed to relitigate the question with each shipper or with the same shipper as to each separate shipment.

Perhaps what we contend for is not strictly the doctrine of *res adjudicata* or estoppel by judgment. Perhaps it is put on firmer footing as a necessary incident of the legislation regulating interstate commerce and the remedies and restrictions created thereby.

Phillips v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, forecasts such a conclusion. It holds that a proceeding before the Interstate Commerce Commission to determine the reasonableness of a rate is not purely private litigation, but is a matter of public concern in which the whole body of shippers is interested, and that the finding inures to the benefit of every person, for otherwise the

formal parties to the proceeding would secure an advantage over the general body of the public, working a preference in favor of the parties to the record which "would have destroyed the very uniformity which that body had been organized to secure."

The following cases apply the same principle:

Mitchell Coal Co. v. *Pa. R. Co.*, 230 U. S. 247.
Babbitt Bros. Tr. Co. v. *A., T. & S. F. Ry. Co.*, 156 I. C. C. 677.
Natl. Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. 65 (C. C. A. 9).
A. L. Jones Co. v. *C., M. & St. P. Ry. Co.*, 213 Ill. App. 283.

The classification, whether by Commission or by Court, of a particular commodity is of interest to every shipper of a commodity belonging to the same class, and while the particular determination presents a factual question of which the Commission has no superior knowledge and is not an administrative question exclusively cognizant by the Commission, yet it is still of such a peculiar nature that the courts having once decided it, every shipper ought to be entitled to the benefit thereof.

POINT C.

(SPECIFICATION 3.)

Damages Are Recoverable If the Commodity Is Scrap.

The Court of Appeals held damages were not recoverable because injury, if any, to petitioners resulted from the rightful refusal to transport the commodity in question as scrap and for other reasons set out in the opinion. Of course, if ultimately it is determined the commodity was scrap, then the carriers' action was unlawful and damages must be assessed. We deem it unnecessary

to enlarge on this point unless the petition for certiorari is granted.

Respectfully submitted,

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